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**IN THE  
COURT OF APPEALS OF INDIANA**

WILLIAM H. HARDING,  
Appellant-Defendant,

VS.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 02A04-0012-CR-516

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Kenneth R. Scheibenberger, Judge  
Cause No. 02D04-0002-DF-84

**(Handdown Date)**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary

William Harding appeals his convictions for residential entry, a Class D felony, and criminal mischief, a Class B misdemeanor, following a jury trial. We reverse and remand.

## Issue<sup>1</sup>

Harding raises one issue for our review which we restate as whether he was subjected to double jeopardy because of his convictions for both residential entry and criminal mischief.

## Facts and Procedural History

On February 9, 2000, Harding went to the home of Laquondra Graham, a woman he had a previous relationship with. After a series of events at her home, Harding broke a kitchen window with an ice scraper and then entered the apartment through the broken window. Harding was charged with residential entry, a Class D felony, and criminal mischief, a Class B misdemeanor.<sup>2</sup> Following his jury trial, Harding was convicted of both charges.<sup>3</sup> He now appeals.

## Discussion and Decision

### Double Jeopardy

Harding argues that his right against being placed in double jeopardy was violated

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<sup>1</sup> We held oral argument in this case on May 10, 2001, at Central Catholic High School in Lafayette, Indiana. We wish to extend our appreciation to the administration, faculty, staff and students of Central Catholic for their hospitality and to the parties for their presentations and for making the trip to Lafayette.

<sup>2</sup> Harding was also charged with rape, a Class B felony, criminal confinement, a Class D felony, and domestic battery, a Class A misdemeanor.

because he was convicted of both residential entry and criminal mischief and there was a reasonable probability that the jury used the same evidence to convict him of both offenses. He asserts that the broken window used to support the residential entry conviction was the same broken window used to support the criminal mischief conviction. Therefore, he contends that the same evidence, the broken window, was used to convict him of both crimes and results in double jeopardy, requiring that the conviction for criminal mischief be vacated.

The State argues that Harding was not subjected to double jeopardy because convictions for residential entry and criminal mischief each require proof of an element that the other does not. Further, the State asserts that Harding failed to prove that there was a reasonable possibility that the jury used the same evidentiary facts to establish both offenses. Finally, the State claims that because Harding was sentenced to concurrent terms for both convictions, he is not facing multiple punishments and thus, his right to be free from double jeopardy was not violated.<sup>4</sup>

Our Supreme Court has stated that:

[T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

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<sup>3</sup> Harding was also found guilty of domestic battery, a Class A misdemeanor, and was found to be an habitual offender. The jury was unable to reach a verdict on both the rape and criminal confinement charges and the State subsequently dismissed these charges.

<sup>4</sup> The State also argues that the fact that Harding grabbed Graham on February 9, 2000, grabbed her keys, and unlocked and entered her apartment could also sustain a conviction for residential entry. However, the charging information does not reference this incident and only references the date February 10, 2000, with respect to the residential entry charge. Further, the State did not address this set of facts in its opening or closing argument as the grounds for residential entry. Thus, the State's argument with respect to the events which transpired on February 9, 2000, must fail.

Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original).

Under the actual evidence test set forth in Richardson, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. Thy Ho v. State, 725 N.E.2d 988, 991 (Ind. Ct. App. 2000). The defendant bears the burden of showing a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id.

Additionally, the fact that a defendant receives concurrent sentences on two separate convictions does not preclude a determination that those convictions violate double jeopardy. See Noble v. State, 734 N.E.2d 1119, 1125 (Ind. Ct. App. 2000), trans. denied. Multiple convictions, multiple punishments, "as well as multiple prosecutions, violate the Indiana double jeopardy clause." Id.

Harding was convicted of residential entry, which is defined by statute to be committed by "[a] person who knowingly or intentionally breaks and enters the dwelling of another person . . . ." Ind. Code § 35-43-2-1.5. To prove the offense of residential entry, the State presented evidence that Harding did not live with Graham and did not have a key to the apartment, he intentionally broke the window of Graham's apartment, and he entered the apartment through the window. Harding was also convicted of criminal mischief, which requires proof that he "recklessly, knowingly, or intentionally damage[d] or deface[d] property of another person without the other person's consent . . . ." Ind. Code § 35-43-1-2. To prove the offense of criminal mischief, the State presented evidence that Harding took an

ice scraper and broke a window of Graham's apartment.

Thus, the evidence presented at trial demonstrates that Harding broke a window through which he entered Graham's apartment. That evidence is an integral part of both offenses and there is a reasonable probability that the jury used the same evidentiary facts, specifically the broken window, to establish both residential entry and criminal mischief. Therefore, both convictions cannot stand and the conviction for criminal mischief should be vacated.

### Conclusion

We hold that double jeopardy protections were violated by Harding's convictions of both residential entry and criminal mischief. Accordingly, we reverse and remand.

Reversed and remanded.